No. 14,610

United States Court of Appeals

For the Ninth Circuit

BERNARD G. JESONIS,
Appellant,

vs.

OLIVER J. OLSON AND CO.,
Appellee.

BRIEF FOR APPELLANT.

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I.

JURISDICTION.

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division (Cl. Tr., p. 71). Notice of Appeal to this Honorable Court was timely filed (Cl. Tr., p. 78). The case was a seaman's action for damages, wages, maintenance and cure on account of personal injuries under the Jones Act (Act of June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, 46 U.S.C. Sec. 688) and the general maritime law, the District Court having jurisdiction under both provisions of law (Cl. Tr., p. 2). This Court has jurisdiction of this appeal pursuant to the Act of June 25, 1948 (c. 646, 62 Stat. 929, 28 U.S.C. Sec. 1291).

II.

QUESTIONS INVOLVED.

1. Did the trial Court err in giving to the jury instructions requested by appellee, and in refusing other instructions requested by appellant?

2. Did the trial Court err on the question of jurisdiction in taking away from the jury the maritime issue of unseaworthiness?

3. Was the jury's verdict so contrary to the weight of the evidence that a miscarriage of justice was done?

4. If the Court below properly had jurisdiction to determine the maritime issue of unseaworthiness, apart from the jury, was the Court's determination of this cause of action in appellee's favor contrary to the great weight of the evidence?

III.

STATEMENT OF THE CASE.

The appellant, Bernard Jesonis, is an American merchant seaman. He was injured aboard appellee Oliver J. Olson & Co.'s steam schooner, the MARY OLSON, at Longview, Washington, on June 24, 1953. The vessel at the time was at a dock loading lumber in the number 4 hold.

Appellant was descending the steel ladder at the forward end of number 4 hatch when he was caused to fall into the lower hold, a distance of 20 feet, suffering severe injuries consisting of os calcis fractures

of both heels, and a back injury. Appellant was removed to Cowlitz General Hospital at Longview for treatment, and later was a patient at the Marine Hospital in San Francisco, and the Public Health Service at San Pedro, California.

Appellant's fall was caused by the fact that several rungs of the ladder he was descending were bent out of shape, and were grease and oil covered.

Appellant was off work for a period of 10 months, and still suffers from a permanent disability to his feet and back. He claimed damages for loss of wages, permanent partial disability, and pain and suffering.

IV.

SUMMARY OF ARGUMENT.

1. Appellant contends that the trial Court erred in granting certain instructions requested by appellee, over appellant's objections, particularly on the matter of "assumption of risk"; in giving an "unavoidable accident" instruction which was not within the issues; in unduly emphasizing defense instructions; in giving "formula" defense instructions; and in failing to give appellant's requested instructions on negligence and contributory negligence, and in modifying appellant's instruction on the "assumption of risk" doctrine so as to not properly state the law, particularly when coupled with appellee's erroneous instructions on this subject.

2. The Court below erred on jurisdiction in taking away from the jury the maritime issue of "unsea-

worthiness''. This cause of action, as well as the Jones Act cause of action, should have been submitted to the jury.

3. The evidence required a verdict in favor of appellant. There was no question but that the rungs of the ladder were bent, and grease and oil covered and that this caused appellant's fall. This was negligence under the Jones Act and ''unseaworthiness'' under the general maritime law. The verdict for appellee was a miscarriage of justice.

4. If the Court properly had jurisdiction of the ''unseaworthiness'' cause, then its decision on that theory should have been in appellant's favor.

V.

ARGUMENT.

1. THE COURT BELOW ERRED IN GRANTING CERTAIN INSTRUCTIONS REQUESTED BY APPELLEE AND IN REFUSING OTHER INSTRUCTIONS REQUESTED BY APPELLANT.

A. The Court's instructions on the doctrine of ''assumption of risk'' were erroneous, and materially affected the jury's verdict.

The defense instructions given by the Court on this subject were as follows:

> ''You are instructed that the plaintiff, as an employee, *in the absence of negligence on the part of his employer* assumed the ordinary risks of his employment as a seaman. There is some danger of injury in every employment as there is in almost every human activity. In some em-

ployments there are more dangers normally incident to the exercise of that employment than in others. The work of a seaman on a vessel cannot be measured in the terms of employment on shore, but must be considered in the light of dangers normally incident to that employment. An employer is not liable simply because there is or may be danger normally incident to an employment. An employer is liable under the Jones Act only when he is negligent. Negligence is a relative term and must be measured according to the circumstances of the employment and the facts of each particular case." (Appellee's requested instruction No. 20, Cl. Tr., p. 53.) (Italicized portion added by Court.)

"Under the law governing this case the steamship company does not insure or guarantee its employees against the possibility of an accident. Its duty is to exercise ordinary care. In so far as it performs that duty it fulfills the law and incurs no liability for accidental injury. Inherent in the nature of the steamship business and in the work of seamen are certain hazards, but even those hazards do not make the company an insurer or change the rule of liability that I have stated. The exercise of ordinary care may be relative in that caution should increase with danger that is known or may reasonably be expected. But liability may not be imposed unless there has been proof by a preponderance of the evidence of negligence through a breach of the obligation to use ordinary care." (Appellee's requested Instruction No. 16, Cl. Tr., p. 51.)

Appellant objected to these instructions (R., pp. 298-300, 306-307, p. 293).

The Court modified appellant's requested instruction No. 1, the material parts of which are as follows:

> "Plaintiff's action is brought under the Jones Act, an act passed by the Congress of the United States for the benefit and protection of merchant seamen, ~~and which law abolished various common law defenses formerly available to an employer in a case such as this~~.
>
> ~~Thus~~, the plaintiff ~~does not assume any of the risks or hazards of his employment; he~~ is not barred from recovering damages, if he otherwise proves his case, because his negligence may have contributed in part to the accident; and he is not barred from recovering damages if he has been injured due to the negligence of a fellow servant or co-worker on the ship." (Cl. Tr., p. 25.)

The words which are crossed out were omitted in the Court's charge. Appellant contends the Court should have charged the jury as requested by him that a seaman "does not assume any of the risks or hazards of his employment." (Appellant's objections to the Court's refusal to give his instruction No. 1 as submitted appear R. pp. 305-307.)

The import of the instructions given by the Court on the vital issue of "assumption of risk" was that a seaman's work was more hazardous than the work of other workers, particularly shoreside workers, and therefore the seaman assumed such hazards incident to his employment.

The Court profoundly misunderstood and misstated the law. The *exact opposite* of what the Court in-

structed the jury is the law. Because a seaman's work is so hazardous, he does not assume the risks of his employment, except in certain instances which are not applicable to the facts of our case. The duty of care owed to a seaman is greater than that owed to shoreside employees.

The correct rule is stated in *Armit v. Loveland,* (C.C.A. 3), 115 Fed. 2d 308, at p. 311, a case which on its facts is remarkably close to ours:

> "The throwing of oil about the engine room and upon the ladder leading therefrom was the natural and foreseeable result of the rotation of the engine's crank in the absence of splash plates. It was equally apparent that the slippery properties of the oil made the floor of the engine room and the treads of the ladder an unsafe place upon which to step. Any thought of assumption of risk on the part of the plaintiff is not germane to the question of the ship owner's negligence in the maintenance of the unsafe condition. *Assumption of risk is not even available as an affirmative defense to an action under the Jones Act.* * * *
>
> * * * The same peculiar circumstances attending the employment alike require that the rules of the common law respecting proof of the employer's negligence be not visited too rigorously upon seaman. Stated conversely, *a higher degree of care is required of the employers of seamen than is required of employers of servants for work ashore.*" (Emphasis supplied.)

The leading case on the question of assumption of risk, of course, is *Socony Vacuum Oil Co. v. Smith,*

305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265. The Supreme Court said, 305 U. S. at p. 430:

> "Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the *circumstances which attend shore employment,* in relation to which the common law rules of *assumption of risk* and contributory negligence have developed." (Our emphasis.)

Again, at p. 431, the Supreme Court says:

> "There (is) no defense of assumption of risk where the seaman is without opportunity to use a safe appliance * * *."

In the *Socony Vacuum* case, *supra,* the seaman knowingly used a defective step, when a safe way to do the work was known to him, and he was injured. The trial Court instructed the jury that the seaman did not assume the risk of the shipowner's failure to provide him with a safe place to work.

Not only is the law as stated in the foregoing cases decisive of our problem, but the facts are pertinent to our case. Appellant seaman had no choice but to use the ladder on which rungs were bent and grease and oil covered. *Those risks he did not assume.*

Nor did the trial Court cure the erroneous content of appellee's instruction No. 20 by inserting the phrase "in the absence of negligence on the part of his employer" inasmuch as plaintiff's Jones Act case was based on negligence of the shipowner, and he could not prevail if he failed to prove negligence and

proximate cause. But the "assumption of risk" doctrine was completely inappropriate to the facts of this case, and the Court should have instructed the jury that appellant *did not assume any risks,* rather than that he assumed "ordinary risks." From the instructions given, the jury could well have received the impression that a greasy, oil covered, bent ladder was an "ordinary risk" and decided against appellant on that ground. The law is just the opposite.

It is also evident that the duty imposed on a shipowner is a greater one than that imposed on shoreside employers. One of the reasons the "assumption of risk" doctrine has been abolished with regard to maritime employment is because it is more hazardous than shoreside work. The instructions given by the Court (as submitted by appellee) state just the opposite.

The "assumption of risk" doctrine, if it is applicable at all, is not applicable to a case such as ours which rests upon failure of the shipowner to provide a safe place to work and safe, seaworthy and proper appliances. *Socony Vacuum Oil Co. v. Smith, supra.* The risks a seaman assumes are those arising from the ordinary hazards of storm and sea. Those are the hazards "normally incident" to his calling. But an unsafe ladder is not an incident "normal" to the work of a seaman. Judge Denman pointed to the difference in *Matson Navigation Co. v. Hansen* (C.C.A. 9), 132 Fed. 2d 487, at p. 488:

> "No liability flows from requiring a sailor to perform his necessary sailor's duties with the ship

rolling and lurching in a heavy storm, even though he may be injured in a fall caused by a wave sweeping across the deck. Yet the owner would be liable if, instead of performing some necessary duty, he were injured when sent by the mate across the same wave swept deck to rescue the ship's cat."

That there is no "assumption of risk" in cases like ours, and that instructions as given here therefore are completely erroneous, see also,

The Diamond Cement (C.C.A. 9), 95 Fed. 2d 738;

Menefee v. W. R. Chamberlin & Co. (C.C.A. 9), 176 Fed. 2d 828;

Storgard v. France & Canada S. S. Corp., (C.C.A. 2), 263 Fed. 545;

Phillips v. Matson Nav. Co. (D.C. Cal.), 62 F. Supp. 247;

Beadle v. Spencer, 298 U. S. 124, 56 S. Ct. 712, 80 L. Ed. 1082;

The Arizona v. Anelich, 298 U. S. 110, 56 S. Ct. 707, 80 L. Ed. 1075.

Nor can the "assumption of risk" defense be revived under the doctrine of "no negligence." It was abolished "in toto" with the 1939 amendment to the Federal Employers Liability Act (incorporated in full in the Jones Act).

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, pp. 64, 66, 63 S. Ct. 444, 87 L. Ed. 610.

What, in effect, the "assumption of risk" instructions given by the Court did were to instruct the jury

that there was "no negligence" on appellee's part. What the Court should have done was to give proper instructions on comparative negligence only, whereby the jury could have mitigated the damages if it had found defendant negligent and plaintiff guilty of some negligence. That this was in the jury's mind is clear from the questions it propounded to the Court when it returned to the courtroom, during its deliberations, for further instructions (Tr., pp. 396-398).

Appellant's instruction No. 11 (Cl. Tr., p. 32) which the Court gave was the proper and sufficient instruction on this entire matter.

The "assumption of risk" instructions were so clearly wrong and were so unduly emphasized by the Court that they could not help but have materially affected the jury's decision. Even if all other grounds fail, the error in these instructions should compel a reversal. *Wheaton v. Sexton's Lessee,* 17 U. S. 503, 4 Wheat. 503, 4 L. Ed. 626.

B. The Court erred in giving an "unavoidable accident" instruction requested by appellee.

Over appellant's objection (Tr., p. 298) the Court gave appellee's requested instruction No. 18 (Cl. Tr., p. 52) as follows:

> "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident had occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution,

still no one may be held liable for injuries resulting from it."

Appellant contended that the instruction was not within the issues (Tr., p. 298). There was here no "unavoidable accident" or even a suggestion of one. The case was clearly one of negligence and unseaworthiness. Nothing occurred which was "unavoidable." The contrary is true. The grease and oil could have been removed and conditions corrected on deck to make the ladder grease and oil free, and the bent ladder rungs could and should have been straightened out.

Even the trial Court recognized the vice of this instruction by commenting, "There is a question always of unavoidable accident. *I have never seen one,* but they always give it." (Tr., p. 298, emphasis supplied.) The Court agreed with appellant's objection, and then turned around and gave the objectionable instruction because it is "always given." This is a very poor reason for giving an erroneous instruction.

Particularly appropriate is the decision in *Johnson v. Macias* (C.C.A. 5), 193 Fed. 2d 475, p. 479:

> "The trial court did not err in refusing to give a charge on 'unavoidable accident.' An 'unavoidable' accident is one which is not occasioned in any degree, directly or remotely, by lack of care. If the injury complained of could have been prevented by the exercise of reasonable prudence, it would not be the result of 'unavoidable' accident. There is no evidence here tending to show that plaintiff's injuries resulted from any cause other than negligence on the part

of someone. The issue of unavoidable accident is therefore not presented."

The "unavoidable accident" instruction or theory is almost always related to a so-called "Act of God" occurrence. *The Empress of France* (D.C. N.Y.), 49 Fed. 2d 291.

But where the injury could have been prevented by ordinary precaution, the defense of "unavoidable accident" is completely inapplicable. *Standard Brands v. N. Y. K.* (D.C. Mass.), 42 F. Supp. 43; Cf. *Tiller v. Atlantic Coast Line R. Co., supra.*

It is clear that the injury to appellant could have been avoided by the use of ordinary precautions on appellee's part. There was nothing "unavoidable" or "inevitable" about appellant's accident.

The instruction on this point, therefore, was entirely outside the issues and the evidence, and materially affected the jury's verdict. The giving of this instruction was prejudicial. *Wheaton v. Sexton's Lessee, supra.*

C. The Court unduly emphasized "defense" instructions, misstated the law in various of these instructions, and gave improper "formula" instructions.

Appellant objected (Tr., p. 393) to appellee's instruction No. 8 (Cl. Tr., p. 46) which stated:

> "No presumption of negligence is created by reason of mere happening of an accident. Unless you can determine from preponderance of the evidence *the manner in which the accident occurred* and that it was proximately caused by negligence on the part of the defendant, it is your duty to

find for the defendant on the issue of negligence." (Emphasis supplied.)

There is no requirement that a jury must find "the manner in which the accident occurred." The elements of a cause of action for negligence (and the Jones Act is an employer's liability statute based upon negligence) are these: (1) the interest invaded is protected against unintentional invasion; (2) the conduct of the actor is negligent with respect to such interest; (3) the actor's conduct is a legal cause of the invasion; (4) the other has not so conducted himself as to disable himself from bringing an action for such invasion. *Restatement of the Law of Torts,* Vol. 2, p. 734, Sec. 281.

The objectionable instruction goes beyond these elements of a tort, and requires the jury to find an additional element unknown to the law of negligence, which need not be found, and in fact, which perhaps could not be found. It is not necessary that the jury determine the "manner" of the accident, whether it was caused by appellant's slipping on oil or grease, or by the bent ladder rungs, or by both. All the jury need find is that appellee was (1) negligent, and (2) that this negligence proximately caused the accident. Liability thereupon follows.

This instruction is further objectionable by its use of the formula phrase "it is your duty to find for the defendant on the issue of negligence." Such a formula instruction, if proper at all, must state *all the elements* essential to the case of the party in whose behalf it is given. Not only did this formula instruction insert an improper element, the question of the

"manner" in which the accident happened, it failed to include such essential elements that defendant must provide a safe place to work, and safe, proper and seaworthy appliances. It must be remembered that this is a seaman's case under the Jones Act. Therefor, all elements required to state a shipowner's liability under the Jones Act must be included to make a formula instruction proper. Failure so to do vitiates such an instruction and constitutes reversible error.

Kanananakoa v. Badalamente, 119 Cal. App. 231;

Harvey v. Aceves, 115 Cal. App. 333;

Spear v. Leuenberger, 44 Cal. App. 2d 236;

Mazzotta v. Los Angeles Ry. Corp., 25 Cal. 2d 165.

Finally, instruction No. 8 is practically repetitive of appellee's instruction No. 7 which stated (Cl. Tr., p. 46):

> "Under the Jones Act, which is the statute of the United States upon which plaintiff has based a claim for damages for personal injuries, the action is founded upon a claim of negligence. In order to maintain such an action the plaintiff *must prove by a preponderance of the evidence that there was a negligent act of the defendant, and that that act proximately caused the alleged injury."* (Emphasis supplied.)

It is objectionable on the ground of repetition.

Chutuk v. Southern Counties Gas Co., 21 Cal. 2d 372;

Snodgrass v. United States (C.C.A. 9), 61 Fed. 2d 99, 101.

Appellant objected (Tr., p. 11) to appellee's instruction No. 11 (Cl. Tr., p. 48) which stated:

> "Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. It is not sufficient for the plaintiff to prove that the accident could have been prevented by the exercise of exceptional foresight on the part of defendant. Defendant can be held liable only if the accident was caused by failure on its part to exercise ordinary care. If the weight of the evidence on this issue is in favor of the defendant, or if it is equally balanced, then your verdict must be for the defendant."

This is also a formula instruction, and the argument and authorities addressed to appellee's instruction No. 8 is likewise applicable here.

Appellant objected (Tr., p. 393) to appellee's instructions Nos. 15 and 16 (Cl. Tr., pp. 50-51) which stated:

> "Proof merely of the existence of a defective condition in equipment does not in itself establish negligence. Before recovery may be had by a plaintiff the proof must show by a preponderance of evidence not only the existence of a defective condition but, first, that such condition arose through negligence, and, second, that the particular condition was the proximate cause of injury to the plaintiff." (No. 15.)

"Under the law governing this case the steamship company does not insure or guarantee its employees against the possibility of an accident. Its duty is to exercise ordinary care. In so far as it performs that duty it fulfills the law and incurs no liability for accidental injury. *Inherent in the nature of the steamship business and in the work of seamen are certain hazards, but even those hazards do not make the company an insurer or change the rule of liability that I have stated.* The exercise of ordinary care may be relative in that caution should increase with danger that is known or may reasonably be expected. *But liability may not be imposed unless there has been proof by a preponderance of the evidence of negligence through a breach of the obligation to use ordinary care."* (No. 16. Emphasis supplied.)

These instructions cover the same ground reached in instructions Nos. 7, 8 and 11. The argument and authorities addressed to those instructions cover appellant's objections to these instructions. In addition, instruction No. 16 is objectionable for the same reasons discussed under the "assumption of risk" point. No. 16 is in fact an "assumption of risk" instruction stated another way.

Appellant objected (Tr., p. 394) to appellee's instructions Nos. 22 and 24 (Cl. Tr., pp. 54-56) which stated:

"The defense of contributory negligence has been pleaded by the defendant in this case. To establish this defense the burden is upon the de-

fendant to prove by a preponderance of the evidence that the plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of injury. This proof may be established, like other proof, through a witness or witnesses produced by the opposing party. If the burden of proving contributory negligence has been fulfilled, then the jury must make the further determination of the proportion of negligence on the part of each party which contributed to the happening of the accident, if any." (No. 22.)

"The plaintiff testified he slipped on the ladder. Your problem is to determine whether the slip was caused by the negligence of the defendant or by the negligence of the plaintiff. If you determine that both plaintiff and defendant were negligent then it will be necessary for you to determine and apportion the negligence between plaintiff and defendant." (No. 22. Italicized portion added by Court.)

"The defendant here has pleaded that the plaintiff was contributorily negligent. Contributory negligence means simply negligence on the part of the plaintiff which, cooperating in some degree with the negligence of another, helps in proximately causing the injuries suffered by the plaintiff. One of the questions for you to determine is whether the plaintiff was negligent and whether his own negligence proximately caused or contributed to the happening of the accident. You must also determine whether the plaintiff's negligence was the only cause of the accident. If you should find that to be true, then he can recover no damages. If, however, you find

that negligence of the plaintiff contributed only in part to the happening of the accident, then you must determine the amount or proportion in which his own negligence contributed to the happening of the accident. That finding is controlling in the determination of damages, if any, as will be explained later." (No. 24.)

These instructions are practically identical. The argument which appellant has previously addressed to the vice of repetitious instructions is applicable here.

D. The Court erred in failing to give instructions requested by appellant.

Appellant objected to the Court's failure to give requested instructions which we will now discuss (Tr. p. 394).

Appellant's requested instruction No. 1 on the question of assumption of risk was a proper statement of the law, and should have been given. *Socony Vacuum Oil Co. v. Smith, supra.* This point is fully discussed, ante, pp. 7-9.

The Court should have given appellant's requested instruction No. 3 on negligence (Cl. Tr., p. 26):

> "Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person."

This instruction properly states the law and is the approved BAJI instruction on negligence. Instead, the Court gave appellee's instruction No. 11 (Cl. Tr., p. 48), the objectionable features of which we already have discussed, *supra,* p. 16. Instruction No. 11 also contained the erroneous "formula" statement.

The Court should have given appellant's proposed instruction No. 10 on contributory negligence (Cl. Tr., p. 31):

> "In this case, defendant claims that plaintiff was guilty of contributory negligence. The burden is upon defendant to prove this defense by a preponderance of the evidence. If defendant fails to discharge such a burden, then the defense of contributory negligence should be completely disregarded by you in reaching a verdict."

This is also an approved BAJI instruction. Instead, the Court gave appellee's instructions Nos. 22 and 24, the objections to which we have discussed, ante, pp. 17-19.

That the Court was unduly favorable to the defense side of the case further appears from its comment to the jury after the defense verdict was returned, *"I think you arrived at a proper verdict."* (R., p. 401. Emphasis supplied.)

All in all, appellant contends that the Court's charge, taken in its entirety, unduly emphasized the defense side of the case, was unfair to appellant, materially affected the jury's verdict, and amounts to reversible error.

2. THE COURT ERRED ON JURISDICTION IN TAKING AWAY FROM THE JURY THE MARITIME ISSUE OF UNSEAWORTHINESS.

Appellant's complaint contained a count based upon negligence under the Jones Act and a second count for unseaworthiness under the general maritime law (Cl. Tr., pp. 5-6).

Appellee moved to transfer this second cause of action to the admiralty side of the Court (Cl. Tr., p. 14), which motion the Court granted (Tr., pp. 3-4).

The Court refused to read appellant's memorandum on this issue (Tr., p. 3), which contained authority that the issue of unseaworthiness was one which the jury should be allowed to pass upon, even though there was no diversity of citizenship between the parties (Cl. Tr., p. 24).

Since a question of law apparent on the record is involved, and appellant did not waive his position in any respect, the ruling by the trial Court on the motion is subject to review in this Court. *United States v. La Franca,* 282 U. S. 568, 570, 75 L. Ed. 551, 554; *Rogers v. City of Burlington,* 70 U. S. 654, 18 L. Ed. 79, 82. Further, since the question presented is one of jurisdiction of the District Court, it can be considered by this Court on appeal even though the point had not been raised below by the parties. *Doucette v. Vincent* (C.C.A. 1), 194 Fed. 2d 834, p. 836.

In his motion for new trial, appellant stated as a ground the trial Court's ruling in taking away from

the jury the issue of unseaworthiness (Cl. Tr., p. 73). The Court denied the motion (Cl. Tr., p. 77). The appeal was from the judgment (Cl. Tr., p. 78). The order of the trial Court in denying the motion is reviewable to determine this question of law: did the trial Court have jurisdiction, in the absence of diversity of citizenship of the parties, to decide the second cause of action for unseaworthiness on the law side, with a jury? *Bass v. Baltimore & Ohio R. Co.* (C.C.A. 7), 142 Fed. 779, p. 780; *Fairmount Glass Co. v. Cub Fork Coal Co.,* 287 U. S. 474, 77 L. Ed. 439.

Appellant contends that the question propounded is answerable in the affirmative. The trial Court apparently relied on *Jordine v. Walling* (C.C.A. 3), 185 Fed. 2d 662, in support of its ruling (R., p. 3), and did not search further into the subject, nor would the trial Court listen to counsel for appellant on this subject. We concede that the *Jordine* case is authority for the trial Court's ruling.

However, there is more convincing, later, and sounder authority in other circuits, in the Supreme Court, and in this Court to support appellant's position that the issue of unseaworthiness was one for the jury.

Doucette v. Vincent, supra, is logical and compelling authority supporting appellant's position. There, in a scholarly and well reasoned opinion Judge Magruder for the Court analyzes the problem, considers and rejects the rationale of the *Jordine* case as an "unfortunate technicality" (194 Fed. 2d, p. 840) and finds that the District Courts have jurisdic-

tion, under the Constitution and the Judicial Code, to determine admiralty causes at law, with a jury, absent diversity of citizenship.

The claim which appellant set up in his second cause of action (and in his third cause of action for maintenance, but which he abandoned, because he was not entitled to maintenance, appellee having already paid it) was for damages based on the vessel's unseaworthiness, a cause of action cognizable in admiralty.

The Constitution, Article III, Section 2, provides that the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction." But at the time the Constitution was adopted, it was well known that many cases, which because of their subject matter were cognizable in a Court of admiralty, also might be prosecuted in a Court of common law (194 Fed. 2d P. 841). This concurrent jurisdiction was recognized and preserved in the Judiciary Act of 1789, 1 Stat. 77, which vested in the District Courts "exclusive * * * admiralty and maritime jurisdiction" coupled with a provision "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." (194 Fed. 2d, p. 841). The content of the "saving clause" was preserved by the 1948 revision of the Judicial Code, 28 U. S. C., Sec. 1333.

The Constitution not only extended the judicial power of the United States to all cases of admiralty and maritime jurisdiction, it also prescribed the substantive law to be applied in such cases.

> "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall 'extend to all cases of admiralty and maritime jurisdiction.' * * * *The Constitution must have referred to a system of law coextensive with and operating uniformly in, the whole country.* It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed * * *." (Emphasis supplied.) Mr. Justice Bradley for the Court in *The Lottawanna,* 88 U. S. 640, 21 Wall. 558, 22 L. Ed. 654, 662. See also *Southern Pacific v. Jensen,* 244 U. S. 205, 61 L. Ed. 1086.

Thus, whether a suit of "admiralty or maritime jurisdiction" be brought in law or admiralty, in state or federal court, the federal maritime law determines the substantive rights of the parties. *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, p. 88, 90 L. Ed. 1099, p. 1103.

But if brought on the law side of the federal Courts, or in the state Courts, *it is the common law remedy "which is saved."* Since a maritime cause is cognizable at common law, since the Constitution makes the grant of maritime jurisdiction to the federal Courts, and since 28 U. S. C., Sec. 1331, provides

for jurisdiction of "civil actions" which "arise under the Constitution," jurisdictional amount of $3,000.00 being present (which it was in our case), it follows that an action for damages civil and maritime based on unseaworthiness may be brought at law in the federal Courts, absent diversity of citizenship (194 Fed. 2d, p. 843).

> "Since a suit on a claim under the general maritime law asserts a substantive right 'under controlling federal law,' * * * what is the sense, in such a case, of requiring in addition that diversity of citizenship be present?"
>
> *Doucette v. Vincent,* 194 Fed. 2d at p. 843.

With regard to the question of jury trial, the Court had this to say, 194 Fed. 2d, p. 846:

> "The only important difference in trying the case on the law side under 28 U. S. C., Sec. 1331, is that plaintiff gets a jury trial, as he would also if the case were tried under Sec. 1332. Conceivably, as a matter of policy, it would be better to try these cases, founded on the general maritime law, in accordance with the historic procedures of courts of admiralty, before a judge without a jury. Congress could have so required, for the parties do not have a constitutional right to a jury trial in cases within the cognizance of a court of admiralty. But Congress made the opposite policy decision way back in 1789, in the famous saving clause, whereunder suitors with claims cognizable in admiralty were also permitted, as theretofore, *to pursue a common law remedy in any common law court of competent jurisdiction, with the incident of a jury trial.*

> And ever since 1789 that has been so." (Emphasis supplied.)

In *Seas Shipping Co. v. Sieracki, supra,* a stevedore maintained an action for damages at law for personal injuries, based upon unseaworthiness of a vessel. It does not appear whether there was diversity. The Supreme Court held that a stevedore had the same right as a seaman to maintain such an action, independent of negligence. The Supreme Court applied "approved rules of the federal maritime law" in reaching its conclusion. The jurisdictional result is reachable under 28 U. S. C., Sec. 1331.

In *Pope & Talbot v. Hawn,* 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, a ship's carpenter injured aboard a vessel in navigable waters of the United States, within the state of Pennsylvania, recovered damages in an action at law with trial by jury alleging both negligence of the vessel's owners and unseaworthiness of the vessel. The Supreme Court held the case to be governed by federal maritime law, both in its substantive and procedural aspects, and disallowed the contributory negligence defense as a bar to the action over appellant's contention that Pennsylvania law should control, and under which the contributory negligence doctrine would be a defense. As part of its argument, appellant argued that there was diversity of citizenship, that the action therefore was under 28 U. S. C., Sec. 1332, and that the federal Courts should follow state law under the *Erie v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 doctrine.

The Supreme Court rejected this contention, stating that the *Erie-Tompkins* case was designed to end just such unfairness as appellant contended for. Had the *Hawn* case been brought on the "admiralty" side, there is no question but that the federal maritime law would forbid the contributory negligence doctrine as a bar. Since the case is on the "law" side, there is no reason in justice or logic to resuscitate that discredited defense on this side of the Court. Otherwise a party's rights would be determined by the fortuitous chance of what "side of the Court" he was on when that should have no place at all in the result of a case. The law to be applied, said the Court, is the federal maritime law, and its rules are the same whether the action be at law or admiralty.

Whether there was jurisdiction of the *Hawn* case on the law side under 28 U. S. C., Sec. 1331, as a case arising "under the Constitution, laws or treaties of the United States" was a question left open by the Court. But the impact of the decision would seem to leave it clear that jurisdiction can be founded on that provision.

To answer such a question in the negative would be to say that a maritime case brought in a state Court at law must be decided under federal admiralty principles with a jury allowable, while if brought in the federal Court without diversity, a jury is not allowable, even though federal law is the source of the right in both Courts and determinative of the parties' rights. How can there be greater rights to a litigant (as trial by jury of a maritime cause) in

a state Court where he invokes a federal law than in the federal Court where the jurisdictional grant of such power (over admiralty and maritime cases) is placed by the Constitution?

Certainly, as Judge Magruder points out in the *Doucette* case, *supra,* such a result would be an "unfortunate technicality."

This Court in the recent case of *Lahde v. Soc. Armadora Del Norte* (C.C.A. 9, Mar. 16, 1955), No. 14,155, had occasion to consider the "purpose" of the *Sieracki* case, *supra,* and said:

> "The 'purpose' of the Sieracki case was the determination of the stevedore's right to recover in a civil action at law for an injury due to the vessel's unseaworthiness."

This Court did not have occasion to reach the question of whether such jurisdiction existed at law absent diversity, but the assumption this Court seems to have made is that which the Supreme Court made as pointed out in the *Doucette* case, *supra,* namely, that there is such jurisdiction at law absent diversity, and it must be under 28 U. S. C., Sec. 1331, as a case "arising under the Constitution, laws or treaties of the United States."

An action for damages based on negligence under the Jones Act and unseaworthiness under the general maritime law may be joined in one complaint and tried without the plaintiff seaman being required to make an election. His recovery might be predicated on one theory or the other or both, although there could be but a single recovery. *McCarthy v. Ameri-*

can Eastern Corp. (C.C.A. 3), 175 Fed. 2d 724; *Balado v. Lykes Bros.* (C.C.A. 2), 179 Fed. 2d 943; *Baltimore S. S. Co. v. Phillips,* 274 U. S. 316, 71 L. Ed. 1069.

This being so, an orderly administration of justice would dictate that if such a case is brought at law with a jury, that the jury determine the entire controversy. Otherwise, a situation might occur where the Court would determine the cause of action left to it in a manner contrary to the jury determination of that part of the case it was to decide. Or as here, the Court quickly and without argument from counsel, followed the jury's verdict (R., p. 401), thereby making meaningless its duty to exercise a considered and independent judgment of the unseaworthiness count.

We conclude that the District Court had jurisdiction at law of the unseaworthiness count, and erred in taking away this count from the jury. The error is one of jurisdiction, materially affecting appellant's rights, and therefore reversible. Cf. *Jacob v. City of New York,* 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166.

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3. THE JURY'S VERDICT WAS CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE AND AMOUNTED TO A MISCARRIAGE OF JUSTICE.

While appellant recognizes the reluctance of any appellate court to disturb a jury verdict where factual questions are in dispute, it will reverse such a verdict where it is so clearly contrary to the weight of the evidence as to be a miscarriage of justice to allow such a verdict to stand. *Southern Ry. Co. v.*

Walters (C.C.A. 8), 47 Fed. 2d 3, reversed, 284 U. S. 190; *Ocean Accident, etc. Corp. v. Penick & Ford* (C.C.A. 8), 101 Fed. 2d 493; *The City of Hartford,* 97 U. S. 323, 24 L. Ed. 930; *Flewellen v. Logan* (C.C.A. 5), 106 Fed. 2d 151, p. 152.

It is not appellant's purpose to review the evidence at any great length, but merely to point briefly to those places in the record where the *undisputed* evidence, and the *credible* evidence demonstrate that the verdict should have gone for appellant, and in fact was the only verdict which the evidence permitted.

Three seamen who testified by deposition were unshaken in their testimony that the ladder on which appellant fell was oily and greasy and the top rungs bent at the time.

Howard W. Sullivan (R., pp. 7-51) testified that he saw appellant fall (R., p. 20), that he fell from the second or third rung of the ladder (R., p. 21), that he took off appellant's boots, which were greasy (R., p. 22), that the coaming where appellant fell was greasy from the tiller chains which ran down each side of the main deck and were slushed with grease (R., pp. 24-25), that the base of the crane above the ladder where appellant fell was greasy from drippings and from a greasy bull rope which was used over the coaming at the head of the ladder (R., pp. 25-26), that no orders were given or time allowed to clean up the grease (R., p. 26), that the second and third rungs of the ladder were bent (R., p. 27), and that there was a lot of oil and grease on the coaming and the ladder where appellant fell (R., p. 28).

On cross-examination, Sullivan corroborated the presence of oil and grease on the ladder when appellant fell (R., p. 37), and that the ladder rungs were bent (R., p. 39).

Appellee also produced a written statement taken from Sullivan by representatives of appellee at St. Helens, Oregon, on July 26, 1953, which stated that there was considerable grease and oil on the coaming at the head of the ladder from the drippings of the crane, and the bull rope. Taken so soon after the accident, prior to any thought of litigation, and *by the company itself,* this statement has the ring of truth—truth which spells appellee's liability.

Edward O. Gschwind (R., pp. 54-89) testified that grease dripped from the tiller chains and crane on the deck at the head of the ladder where appellant fell (R., pp. 62-63), that the bull rope rubbing over the coaming left grease (R., p. 63), that the top rungs of the ladder were bent because of loads hitting them (R., p. 67), and that he saw appellant fall from the first or second rung of the ladder (R., p. 69).

On cross-examination he was unshaken: that there was "so much grease on the deck area, you couldn't help but step in it" (R., p. 81), and that there was grease from the bull rope (R., p. 86) on the deck and coaming.

Nils G. Gelfgren was likewise positive of the conditions which spell out liability. He saw appellant fall (R., p. 94), and the ladder rungs were greasy, oily and bent (R., p. 100).

These witnesses all identified the photographs, appellant's exhibits 1, 2, 3 and 4 (R., pp. 18-19) which clearly and unmistakably show the *bent ladder rungs,* and which all the witnesses say was the condition of the ladder when appellant fell.

Appellant Jesonis himself testified that the bull rope was slushed with oil and rubbed over the coaming at the forward end of number 4 hatch (R., p. 132), that there was oil and grease on the ladder and coaming when he fell (R., pp. 135-136), that the seamen were never ordered to clean up the oil and grease (R., p. 136), that the second and third rungs of the ladder were bent (R., p. 136) as a result of being hit with a load of lumber, that he thinks he fell from the second rung,

> "Because I usually put it way down there so I can get the other foot on the first rung, so as I was swinging over, the other foot slipped off the rung, and when the weight caught my hands, it jerked my hands." (R., p. 141.)

He fell 20 feet, his foot just slipping off the ladder rung (R., p. 142). (We will not review the evidence related to injuries or damages.)

Peter Johnson, second mate on the MARY OLSON, was called as a witness by appellee. He had difficulty in remembering whether he gave one or two statements to representatives of the company, and whether it was up north or when the vessel returned south (R., pp. 265-270). He conceded that the second and third rungs of the ladder were bent as a result of being hit by loads (R., p. 285).

Mr. Johnson denied the presence of oil or grease where appellant fell, declared that the ladders though bent were "in good condition," that it was up to the master and chief mate to order their repair (R., pp. 286-287). He conceded however that grease got on the deck from the tiller chains (R., pp. 286-287).

However, nowhere is there any showing that Mr. Johnson himself descended the ladder at, before or immediately after appellant fell. He is not in a position, therefore, as are appellant's witnesses, to describe the condition of the ladder at the time of the accident. Mr. Johnson's testimony is largely what may be called "negative."

On appellee's case, there was a question by Mr. Harrison, its counsel, and an answer by Mr. Johnson which are significant and revealing, and which we believe cast a substantial doubt on the rest of Mr. Johnson's testimony that the area where appellant fell was grease and oil free.

The following appears in the record at page 256:

> Q. (Mr. Harrison.) Did any of them (seamen) complain to you about any alleged oil in that space between the hatch coaming and the ladder?
>
> A. (Mr. Johnson.) *Yes.*" (Emphasis supplied.)

The logical inferences to be drawn from Mr. Johnson's testimony compel a finding of negligence.

Appellee called as a witness Christian E. Andres, chief mate of the MARY OLSON when appellant was injured.

He denied that there was oil or grease in the area where the ladder went down into the hatch, but admitted that the ladder rungs were bent (R., p. 352). The witness signed an accident report soon after appellant's injury which states that the latter "slipped on the ladder." (R., p. 355, Plaintiff's Exhibit No. 21.)

It is appellant's contention that the witnesses for him, coupled with the testimony of appellee's witnesses, make out such a compelling case of liability that a verdict for appellee was clearly improper and contrary to justice.

That there is liability under the Jones Act in a case where the facts are such as here see *Armit v. Loveland, supra; Phillips v. Matson, supra; Matson Navigation Co. v. Hansen, supra; Socony Vacuum Oil Co. v. Smith, supra; Krey v. United States* (C.C.A. 2), 123 Fed. 2d 1008.

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4. **IF THE TRIAL COURT PROPERLY HAD JURISDICTION, IN THE ABSENCE OF A JURY, TO DECIDE THE QUESTION OF UNSEAWORTHINESS, THEN AN APPEAL IN ADMIRALTY IS PRESENTED ON THIS QUESTION, AND THIS COURT HAS JURISDICTION TO DECIDE DE NOVO WHETHER THE TRIAL COURT'S VERDICT WAS PROPER. APPELLANT CONTENDS THE VESSEL WAS UNSEAWORTHY AND THE VERDICT SHOULD HAVE GONE FOR HIM ON THE UNSEAWORTHINESS COUNT.**

We contend that the unseaworthiness cause should have gone to the jury as discussed, *ante,* pp. 21-29. However, if the Court decides this point adversely to appellant, then an admiralty appeal is presented on the unseaworthiness question, and this Court may con-

sider the entire case and all the evidence *de novo* and decide the question of liability because of unseaworthiness for itself. *The General Pickney,* 9 U. S. 281, 3 L. Ed. 101; *The Louisville,* 154 U. S. 657, 14 S. Ct. 1100, 25 L. Ed. 771; *Brooklyn Eastern Dist. Term. v. United States,* 287 U. S. 170, 53 S. Ct. 103, 77 L. Ed. 240; *The Indien* (C.C.A. 9), 71 Fed. 2d 752; *Olsen v. Alaska Packers Assn.* (C.C.A. 9), 114 Fed. 2d 368; *Petterson v. Alaska S. S. Co.* (C.C.A. 9), 205 Fed. 2d 478.

The evidence reviewed under the previous point demonstrates a case of liability for unseaworthiness. The *credible* evidence proves the ladder to have been oil and grease covered. The *uncontradicted* evidence proves the ladder rungs to have been bent out of shape. Either or both of these situations amounts to unseaworthiness. *Krey v. United States, supra; Lahde v. Soc. Armadora Del Norte, supra.*

This Court sitting *de novo* on the question of unseaworthiness (if it decides the jurisdictional point adversely to appellant) has the power to enter its own independent decision on this point, and appellant contends the evidence calls for a decree in his favor on this cause of action, with the matter of damages to be decided, either on a remand to the District Court or here.

VI.

CONCLUSION.

Appellant respectfully contends that material error was committed below and that the cause should be reversed and remanded for a new trial, or in the alternative that this Court should enter its decree in appellant's favor on the count for unseaworthiness.

Dated, Los Angeles, California,
April 28, 1955.

Respectfully submitted,
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Attorney for Appellant.